LIM TEE KEONG v. HLG SECURITIES SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
MOHAMAD ARIFF YUSOF JCA
MAH WENG KWAI JCA
[CIVIL APPEAL NO: B-03(IM)-2-01-2014]
3 MARCH 2016

BANKRUPTCY: *Discharge – Application for – Exercise of court's discretion – Whether Director General of Insolvency ('DGI') conducted thorough investigations into assets of bankrupt – Failure by bankrupt to file statement of affairs within 21 days after receiving order – Whether an offence under Bankruptcy Act 1967 – Whether non-compliance tantamount to breach of statutory provision – Whether discharge ought to be allowed – Bankruptcy Act 1967, ss. 16(3) & 33(3)*

This was the bankrupt's appeal against the dismissal of his application for discharge from bankruptcy by the High Court pursuant to s. 33 of the Bankruptcy Act 1967 ('the Act'). The bankrupt, who had been in bankruptcy for about ten years before the application for discharge, filed an application to adduce further evidence of his medical condition. However, before the application could be heard, the bankrupt succumbed to his illness and passed away and the appellant carried on the appeal in place of the bankrupt. In the appeal, the appellant contended that the bankrupt was of advanced old age and was suffering from critical illness. The appellant also contended that the judge 'was not alive to the judicial approach' in dealing with the application under s. 33 of the Act and had failed to address his mind to two critical facts, *ie*, (i) that the bankrupt was adjudged a bankrupt due to losses suffered on the share market; and (ii) the bankrupt had suffered the losses during the Asian Financial Crisis 1997/1998. Therefore, the bankrupt had become 'insolvent not through any fault, moral or otherwise, but through just being caught at the wrong turning of the economic cycle'. There was no evidence to suggest that the bankrupt had used 'dishonest or fraudulent methods in conducting his business affairs to the detriment of their creditors' or that the bankrupt had supported a lifestyle of 'rash and extravagant living'. The appellant also submitted that the judge had erred to hold that the bankrupt had committed an offence under s. 16(2)(b) of the Act when he failed to file his statement of affairs within 21 days. In opposing the appeal, the creditor submitted that the discharge should not be allowed because the Director General of Insolvency's ('DGI') report was incomplete and had failed to show that the DGI had undertaken a comprehensive and thorough investigation on the assets of the bankrupt.

Held (dismissing appeal with costs)
Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:

(1) The discretion to be exercised by the court under s. 33(3) of the Act is wide and it is 'fettered only with the consideration of equity, fairness and good conscience' and that a bankrupt should not be put under bondage for his entirety. In exercising the discretion to discharge a bankrupt from a bankruptcy, the court must take into consideration the report of the DGI as to the bankrupt's conduct and affairs. (para 6)

(2) In managing a debt of about RM150 million, the DGI's report was very brief. The DGI should have undertaken a more thorough investigation into the assets of the bankrupt, especially assets which the bankrupt owned in his name, within five years before the date of the receiving order ('RO') was pronounced. This would enable the DGI to make a more realistic assessment of the bankrupt's financial situation. The DGI report 'should have gone further by highlighting all the properties which had been previously owned by the bankrupt and the current owners of the property now (if any). The report should highlight whether the current owners were in a close relationship with the bankrupt and whether there are evidences showing that the current owners were holding the properties as nominees for the bankrupt'. The DGI had failed to address all the issues in the report. (para 16)

(3) The report stated that the Bankruptcy Court had postponed *sine die* one of the public examination sessions to allow the DGI to further investigate on the assets of the bankrupt. Although the DGI stated that he had completed his investigation, there were hardly any comments or remarks in the report as to the result of the investigation or as to the efforts taken to conduct the investigation directed by the court. In the circumstances, the criticisms levelled at the DGI report as being simplistic in approach, incomplete and defective was justified. (para 21)

(4) The trial judge had ordered that the bankrupt come up with 55% dividend because the bankrupt had committed an offence under the Act for failing to file his statement of affairs within 21 days after the RO was ordered as required under s. 16(3). The requirement under the section is mandatory and therefore non-compliance would mean breach of statutory provision. The trial judge was thus correct to equate it with an offence. A contempt of court is a punishable offence. (paras 23 & 24)

Bahasa Malaysia *Headnotes*

Ini adalah rayuan si bankrap terhadap penolakan permohonan untuk pelepasan daripada kebankrapan oleh Mahkamah Tinggi menurut s. 33 Akta Kebankrapan 1967 ('Akta'). Si bankrap, yang bankrap selama kira-kira sepuluh tahun sebelum permohonan pelepasan, memfailkan permohonan untuk mengemukakan keterangan lanjut berkaitan dengan keadaan kesihatannya. Walau bagaimanapun, sebelum permohonan tersebut

didengar, si bankrap meninggal dunia dan perayu meneruskan rayuan bagi pihak si bankrap. Dalam rayuan ini, perayu menghujahkan bahawa si bankrap berusia lanjut dan menghidapi penyakit kritikal. Perayu juga menghujahkan bahawa hakim 'was not alive to the judicial approach' dalam menangani permohonan di bawah s. 33 Akta dan gagal mempertimbangkan dua fakta penting, iaitu (i) bahawa si bankrap diputuskan bankrap disebabkan kerugian yang dialami dalam pasaran saham; dan (ii) si bankrap mengalami kerugian semasa Krisis Kewangan Asian 1997/1998. Oleh itu, si bankrap menjadi 'bankrap bukan kerana kesalahan moral atau sebaliknya, tetapi semata-mata kerana berdepan dengan keadaan ekonomi yang merosot'. Tiada keterangan yang mencadangkan bahawa si bankrap menggunakan 'cara yang tidak jujur atau menipu dalam menjalankan urusan perniagaannya sehingga memudaratkan pemiutang-pemiutang mereka' atau si bankrap menjalani kehidupan yang 'boros dan mewah'. Perayu juga menghujahkan bahawa hakim terkhilaf apabila memutuskan bahawa si bankrap melakukan kesalahan di bawah s. 16(2)(b) Akta apabila gagal memfailkan pernyata kedudukan dalam tempoh 21 hari. Dalam membantah rayuan perayu, pemiutang menghujahkan bahawa pelepasan tidak wajar dibenarkan kerana laporan Ketua Pengarah Insolvensi ('KPI') tidak lengkap dan gagal menunjukkan KPI melakukan siasatan yang menyeluruh dan teliti terhadap aset-aset si bankrap.

Diputuskan (menolak rayuan dengan kos)
Oleh Abdul Aziz Abdul Rahim HMR menyampaikan penghakiman mahkamah:

(1) Budi bicara yang dilaksanakan mahkamah di bawah s. 33(3) Akta adalah luas dan ia 'fettered only with the consideration of equity, fairness and good conscience' dan tidak wajar bagi seseorang bankrap terikat selama-lamanya. Dalam pelaksanaan budi bicara untuk melepaskan seseorang bankrap daripada kebankrapan, mahkamah perlu mempertimbangkan laporan KPI mengenai tindakan dan urusan-urusan si bankrap.

(2) Dalam menguruskan hutang sebanyak kira-kira RM150 juta, laporan KPI amat ringkas. KPI sewajarnya membuat siasatan yang lebih menyeluruh mengenai aset-aset si bankrap, khususnya aset-aset yang dimiliki si bankrap dalam tempoh lima tahun sebelum tarikh perintah penerimaan ('RO') diberikan. Ini akan membolehkan KPI membuat penilaian yang lebih realistik mengenai keadaan kewangan si bankrap. Laporan KPI 'sepatutnya lebih mendalam dengan menonjolkan kesemua hartanah yang sebelumnya dimiliki oleh si bankrap dan pemilik semasa hartanah (jika ada). Laporan tersebut sepatutnya mendedahkan sama ada pemilik semasa mempunyai hubungan erat dengan si bankrap dan sama ada terdapat keterangan menunjukkan bahawa pemilik semasa memegang hartanah sebagai penama bagi si bankrap. KPI gagal mempertimbangkan kesemua isu-isu ini dalam laporan tersebut.

(3) Laporan tersebut menyatakan bahawa Mahkamah Kebankrapan menangguhkan *sine die* salah satu sesi pemeriksaan awam untuk membenarkan KPI menyiasat secara lanjut tentang aset-aset si bankrap. Walaupun KPI menyatakan bahawa beliau telah menyelesaikan siasatannya, tiada apa-apa komen atau catatan dalam laporannya mengenai hasil siasatan atau berkaitan dengan langkah-langkah yang diambil untuk membuat siasatan yang diarahkan mahkamah. Dalam keadaan tersebut, kritikan yang dibuat terhadap laporan KPI sebagai amat ringkas dalam pendekatannya, tidak lengkap dan cacat dijustifikasi.

(4) Hakim bicara memerintahkan si bankrap memberikan dividen 55% kerana si bankrap melakukan satu kesalahan di bawah Akta atas kegagalan memfailkan pernyata kedudukannya dalam tempoh 21 hari selepas RO diperintahkan seperti yang diperlukan di bawah s. 16(3). Keperluan di bawah seksyen tersebut adalah mandatori dan dengan itu ketidakpatuhan bermaksud pelanggaran peruntukan statutori. Hakim bicara oleh itu betul dalam menyamakannya dengan satu kesalahan. Penghinaan mahkamah adalah kesalahan yang boleh dihukum.

Case(s) referred to:

In Re: Zainuldin Ahmad; Ex-parte Wong Siay Patt & Anor [2007] 1 LNS 334 HC ***(refd)***

Lim Hun Swee v. Malaysia British Assurance Bhd & Ors And Other Appeals [2010] 8 CLJ 680 CA ***(refd)***

Re Joshua Tan Pin Pin; Ex p William Jacks & Co (M) Sdn Bhd [2007] 3 CLJ 153 HC ***(refd)***

Re Lau Kah Lay & Tang Kuong Tiew; Ex p Cold Storage (Malaysia) Bhd [2001] 3 CLJ 960 HC ***(refd)***

Re Mohana Sundari M Subramaniam; Ex p United Prime Corporation Bhd [2004] 1 CLJ 624 HC ***(refd)***

Re Siah Ooi Choe [1998] 1 SLR 903 ***(refd)***

Re Siow Ah Moi; Ex p United Orient Leasing Company Bhd [2007] 8 CLJ 104 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 16(2)(b), (3), 33(3), (4), (6), 117A

Penal Code, ss. 421, 422, 423, 424

For the appellant - S Ravindran; M/s Sreenevasan Young

For the respondent - Ravindra Kumar; M/s Raja Darryl & Loh

For the respective creditors - Mandave Singh (for Dato Tan Seng Leong)
Trevor Jason Mark Padasian (for Orix Credit Sdn Bhd)
V Vinodh (for Pan Malaysia Equities Sdn Bhd & Kim Eng Ong Asia Securities)
Ong Chee Kwan (Chew Pei Ying with him) (for TA Securities & TA Centre Berhad); M/s Raja Darryl & Loh

[Editor's note: Appeal from High Court, Shah Alam; Bankruptcy No. 29-3142-1999 (affirmed)]

Reported by S Barathi

JUDGMENT

Abdul Aziz Abdul Rahim JCA:

[1] This is an appeal by the appellant (a bankrupt) who was the applicant in the High Court against the dismissal of his application to be discharged from his bankruptcy on 21 November 2013 by the High Court on appeal to the judge in chambers. The application for the discharge was made pursuant to s. 33 of the Bankruptcy Act 1967 ("the Act"). Earlier the Deputy Registrar had heard the application and had dismissed the same on 5 July 2013.

[2] The bankrupt in this case, Lim Tee Keong, had passed away on 14 April 2014 before this appeal could be heard and disposed of. For the purpose of continuing this appeal, this court had on 30 April 2014, on an application of one Lim Chee Wah the younger brother of the bankrupt, allowed the applicant Lim Chee Wah to carry on this appeal in place of the bankrupt.

[3] Before the application for discharge was made on 11 March 2013 the bankrupt has been in bankruptcy for about ten years. He was about 65 years at that time and was diagnosed with Stage IV Esophageal Carcinoma (cancer of the throat) sometime in February 2014. The bankrupt had filed an application on 17 March 2014 (encl. 12a) to adduce further evidence of his medical condition. But before the application (encl. 12a) could be heard, the bankrupt succumbed to his illness and passed away. In his affidavit in support of the application affirmed on 14 March 2014 (before his death), the late bankrupt had stated that it was his fervent wish to have 'his name cleared and to spend the remainder of his life free from the shackles and stigma of the bankruptcy that has plagued him since 2003.

[4] The late bankrupt was adjudged as a bankrupt on 18 February 2003 on a petition presented by the respondent.

[5] Since the application for discharge as a bankrupt was made under s. 33 of the Act, it would be helpful if we reproduce the section in full:

> Discharge of bankrupt by order of court
>
> 33.(1) A bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and the court shall appoint a day for hearing the application.
>
> (2) (Deleted by Act A827).
>
> (3) On the hearing of the application the court shall take into consideration a report of the Director General of Insolvency as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may either grant or refuse an absolute order of discharge, or suspend the operation order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property.

A (4) In all cases where it is proved to the satisfaction of the court that the bankrupt has committed any offence under this Act or under any written law repealed by this Act or under section 421, 422, 423 or 424 of the Penal Code [Act 574] the court shall unless Bankruptcy 37 for special reasons it otherwise determines either refuse the discharge or suspend the operation of the order until a dividend of not less than fifty per centum B has been paid to the creditors, and on proof of any of the facts mentioned in subsection (6) the court shall either:

(a) refuse the order; or

(b) suspend the operation of the order for a specified time; or

C (c) suspend the operation of the order until a dividend of not less than fifty per centum has been paid to the creditors; or

(d) grant an order of discharge subject to such conditions as aforesaid.

The powers of suspending and attaching conditions to a bankrupt's discharge may be exercised concurrently.

D (5) If at any time after the expiration of two years from the date of any order made under this section the bankrupt satisfies the court that there is no reasonable probability of his being in a position to comply with the terms of such order, the court may modify the terms of the order or any subsequent order in such manner and upon such conditions as it thinks E fit.

(6) The facts hereinbefore referred to are:

(a) that the bankrupt has omitted to keep such books of account as sufficiently disclose his business transactions and financial position within the three years immediately preceding his F bankruptcy, or within such shorter period immediately preceding that event as the court deems reasonable in the circumstances;

(b) that the bankrupt has continued to trade after knowing or having reason to believe himself to be insolvent;

G (c) that the bankrupt has contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable ground of expectation, proof whereof shall lie on him, of being able to pay it;

(d) that the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities;

H (e) that the bankrupt has brought on or contributed to his bankruptcy by rash and hazardous speculations or extravagance in living, or by recklessness, or gambling or want of reasonable care and attention to his business and affairs;

I (f) that the bankrupt has delayed or put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action or other legal proceedings properly brought or instituted against him;

(g) that the bankrupt has brought on or contributed to his bankruptcy by incurring unjustifiable expense in bringing any frivolous or vexatious action;

(h) that the bankrupt has within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors;

(i) that the bankrupt has within three months preceding the date of the receiving order incurred liabilities with a view to making his assets equal to an amount of fifty ringgit per centum of the amount of his unsecured liabilities;

(j) that the bankrupt has in Malaysia or elsewhere on any previous occasion been adjudged bankrupt or made a composition or arrangement with his creditors;

(k) that the bankrupt has been guilty of any fraud or fraudulent breach of trust;

(l) that the bankrupt has within three months immediately preceding the date of the receiving order sent goods out of Malaysia under circumstances which afford reasonable grounds for believing that the transaction was not a *bona fide* commercial transaction;

(m) that the bankrupt's assets are not of a value equal to fifty ringgit per centum of the amount of his unsecured liabilities, unless he satisfies the court that the fact that the assets are not of a value equal to fifty ringgit per centum of his unsecured liabilities has arisen from circumstances for or in respect of which he cannot justly be held blameable.

(7) For the purposes of this section a bankrupt's assets shall be deemed of a value equal to fifty ringgit per centum of the amount of his unsecured liabilities when the court is satisfied that the property of the bankrupt has realised or is likely to realise or with due care in realisation might have realised an amount equal to fifty ringgit per centum of the amount of his unsecured liabilities and a report by the Director General of Insolvency shall be *prima facie* evidence of the amount of such liabilities.

(8) For the purposes of this section the report of the Director General of Insolvency shall be *prima facie* evidence of the statements therein contained.

(9) Notice of the appointment by the court of the day for hearing the application for discharge shall be published as prescribed and sent fourteen days at least before the day so appointed to each creditor who has proved, and the court shall hear the Director General of Insolvency, and may also hear any creditor. At the hearing the court may put such questions to the debtor and receive such evidence as it thinks fit.

(10) The court may, as one of the conditions referred to in this section, require the bankrupt to consent to judgment being entered against him by the Director General of Insolvency for any balance, or part of the

A balance, of the debts provable under the bankruptcy which is not satisfied at the date of his discharge; but in such case execution shall not be issued on the judgment without leave of the court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available for payment of his debts.

B (11) (Deleted by Act A1035).

(12) For the purposes of this section the following presumptions shall be made:

(a) if at any time after the expiration of six months from the date of the adjudication the Director General of Insolvency reports C to the court that the value of the assets which have been realised, together with the estimated value of the assets which are realisable, is insufficient to pay a dividend of fifty ringgit per centum on the debts proved in the bankruptcy, it shall be presumed, until the contrary is proved, that the bankrupt has continued to trade after knowing or having reason to believe D himself to be insolvent;

(b) in determining whether a bankrupt was, or knew, or had reason to believe himself to be insolvent at any particular date, every debt owing to him by any person resident out of the jurisdiction, which debt had been at such date due for more than twelve E months, shall be excluded from the computation of the value of the assets, and for the purpose of such computation shall be deemed not to be an asset;

(c) a bankrupt shall be deemed to have continued to trade after knowing or having reason to believe himself to be insolvent if, having continued to trade after he was in fact insolvent, he: F

(i) is unable to satisfy the court that he had reasonable ground for believing himself to be solvent; or

(ii) fails without reasonable excuse, proof whereof shall lie on him, to produce a proper balance sheet for each of the three G years immediately preceding the bankruptcy, every such balance sheet being made within a reasonable time after the expiration of the year to which it relates, and showing the true state of his affairs at the end of such year;

(d) any preference given by the bankrupt to any creditor within the three months immediately preceding the date of the receiving H order shall, until the contrary is proved, be deemed to be undue.

[6] It will be noticed that the decision to discharge a bankrupt from a bankruptcy is an exercise of discretion by a judge. It can be made at any time after a bankrupt had been adjudged a bankrupt. In exercising the discretion, I the court which hears the application for discharge must take into consideration a report of the DGI as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under

his bankruptcy. More importantly is the provision of s. 33(4) of the Act where it provides that in all cases where it is proved to the satisfaction of the court that the bankrupt has committed an offence under the Act or under any written law repealed by the Act or under ss. 421, 422, 423 or 424 of the Penal Code the court shall unless for special reasons it otherwise determines either refuse the discharge or suspend the operation of the order until a dividend of not less than 50% has been paid to the creditors.

[7] In *Lim Hun Swee v. Malaysia British Assurance Bhd & Ors And Other Appeals* [2010] 8 CLJ 680; [2011] 2 MLJ 218, Ramly Ali JCA (as he then was, and now a Federal Court Judge) speaking of for this court held, at p. 688-689 (CLJ); p. 226 (MLJ), that consideration of the DGI report by the court hearing an application for discharge from bankruptcy is a mandatory requirement and the most important consideration. However the court is not bound to accept the report if the court is satisfied that the report is incomplete and unreliable or made based on incomplete investigation into the conduct and affairs of the bankrupt. The learned judge further said that:

> Without a proper or complete report by the DGI, the court cannot decide on the issue of discharge. The purpose of the DGI report is to secure a full and complete investigation and disclosure of all material facts or information relating to the bankruptcy particularly on issues stipulated under s. 33(4) and (6) of the Act. The report is not only for the interest of the bankrupt and the creditors but also the interest of the public as well as the business community at large.

[8] In this appeal, learned counsel for the appellant besides harping on the fact that the late bankrupt was of advanced old age and suffering from cancer of the throat and had endured the bankruptcy for ten years, contends that the learned judge 'was not alive to the judicial approach' in dealing with application under s. 33 of the Act. He submitted that the learned judge had failed to address his mind to two critical facts that were part of the record before the court. The first fact, learned counsel said, is that the bankrupt was adjudged a bankrupt due to losses suffered on the share market. This fact was noted in the DGI's report dated 5 April 2013. The second fact is that the bankrupt had suffered those losses during the infamous Asian Financial Crisis on 1997/1998. Therefore it was submitted that the late bankrupt who was a businessman, became 'insolvent not through any fault, moral or otherwise, but through just being caught at the wrong turning of the economic cycle'. There was no evidence, he said, to suggest that the late bankrupt had 'used dishonest or fraudulent methods in conducting his business affairs to the detriment of their creditors' or that the bankrupt had supported a lifestyle of 'rash and extravagant living'.

[9] Relying on *Re Siow Ah Moi; Ex p United Orient Leasing Company Bhd* [2007] 8 CLJ 104; [2007] 3 MLJ 713 learned counsel for the appellant submitted that the Act is a social legislation and the purpose is not to keep

a bankrupt as a bankrupt until the bankrupt settles all his obligations pursuant to the law; but to protect the bankrupt from harshness of the mounting debt and to enable fair and equal distribution of available assets among the creditors.

[10] Learned counsel for the appellant further submitted that the learned judge had erred to hold that the bankrupt had committed an offence under s. 16(2)(b) of the Act when the bankrupt failed to file his statement of affairs within 21 days as required under the section. This section reads:

> Debtor's statement of affairs
>
> 16.(1) ...
>
> (2) The statement shall be so submitted within the following times:
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> (a) ...
>
> (b) if the order is made on the petition of a creditor, within twenty-one days from the date of the order,
>
> but the Director General of Insolvency may in either case for special reasons extend the time by order made under his hand, to be forthwith filed, recording the reasons therefor.

[11] This 'offence' read together with s. 33(4) of the Act persuaded the learned judge to require the bankrupt to meet the 50% dividend requirement in s. 33(6) before he could be considered for any discharge from the bankruptcy. Learned counsel argued that the learned judge in reading s. 16(3) of the Act had equated the expression 'contempt of court' in that section with the expression 'offence under this Act' in s. 33(4). He submitted that the expression 'offence under this Act' when read in conjunction with Part VII of the Act should be read to refer to bankruptcy offences under s. 117A of the Act. He further submitted that in *Re Joshua Tan Pin Pin; Ex p William Jacks & Co (M) Sdn Bhd* [2007] 3 CLJ 153, s .33(4) of the Act is only activated when the bankrupt has been convicted of a bankruptcy offence. In this case the bankrupt was never tried or charge for any bankruptcy offence; and this was acknowledged by the DGI in his report.

[12] The bankrupt was made a bankrupt on a bankruptcy petition filed by the respondent. The respondent is not opposing or objecting the discharge of the bankrupt from the bankruptcy. From the Appendix A attached to the appellant's submission, there are all together 13 creditors. The grand total of debts admitted as provable in bankruptcy for these 13 creditors is RM146,621,991.01. However out of these 13 creditors, learned counsel submitted that eight creditors (No. 1 to 8) in the appellant's Appendix A have agreed to consent to the discharge and not opposing the appeal. Between them the total debts admitted as provable in bankruptcy is RM97,229,665.78 which constitute 66.3% of the grand total of provable debt. The remaining five creditors (No. 9 to 13 in Appendix A) who opposed the discharge and this appeal have a total provable debt of RM49,393,335.23 which is about 33.7% of the grand total of provable debt in bankruptcy.

[13] As to the judicial approach established and laid down through decided cases mentioned in the appellant's submission, it is this: in considering whether or not to grant the discharge, the court has to balance two conflicting concerns. The first concern is that it would be undesirable to let those who became bankrupt off the hook if they have brought about their bankruptcy by dishonest business dealings, rash and extravagance in living and if they have conducted their business affairs to the detriment of their creditors. The other concern is exactly the opposite: it would be in the interest of society and commercial morality that people who have become bankrupt through little fault of their own but just being caught at the wrong turn of the economic cycle be given a second chance in life – see *Re Siah Ooi Choe* [1998] 1 SLR 903; *Re Mohana Sundari M Subramaniam; Ex p United Prime Corporation Bhd* [2004] 1 CLJ 624. And *In Re: Zainuldin Ahmad; Ex-parte Wong Siay Patt & Anor* [2007] 1 LNS 334, Kang Hwee Gee J (as he then was) said that the discretion to be exercised by the court under s. 33(3) of the Act is wide; and it is 'fettered only with the consideration of equity, fairness and good conscience' and that a bankrupt should not be put under bondage for its entirety.

[14] AmBank (M) Berhad, one of the creditors that appeared before us to oppose this appeal, submitted thorough its counsel that the discharge should not be allowed because the DGI report is incomplete. The report never disclosed or address the fact the bankrupt filed its statement of affairs (on 9 June 2013) almost four months too late. The statement of affairs was supposed to be filed within 21 days from the date of receiving order. The RO was made on 18 February 2003. There was no evidence of approval by the DGI for filing of the statement of affairs beyond the 21 days as required under s. 16(2)(b) of the Act. Learned counsel also submitted that the non-compliance with the requirement of s. 16(2)(b) was never addressed by the DGI in his report. Instead the report merely states that the bankrupt did not commit any offence under the Act. There was also no explanation from the bankrupt for the delay and non-compliance.

[15] Further it was submitted for AmBank (M) Berhad that the DGI report has failed to show that the DGI had undertaken a comprehensive and thorough investigation on the assets of the bankrupt. It was submitted that on the authority of *Re Lau Kah Lay & Tang Kuong Tiew; Ex p Cold Storage (Malaysia) Bhd* [2001] 3 CLJ 960 the DGI has the onerous task of ensuring that a bankrupt does not attempt to hide or stashed away assets either in his name or the name of his wife and children with the intention to keep the assets out of reach of the creditors. In the instant case the DGI report only shows that the DGI had written only to the Municipal Council of Petaling Jaya to trace the assets of the bankrupt. It was submitted this effort was not enough. The bankrupt is the eldest son of the late Tan Sri Lim Goh Tong, the founder of the Genting Highland Casino; and all the bankrupt's sons are quite successful in their businesses which is evidence by a report in the "Edge" dated 10 October 2012.

[16] We agree with learned counsel for the supporting creditor AmBank (M) Bhd that the DGI could have and in fact should have undertaken a more thorough investigation into the assets of the bankrupt; especially assets which the bankrupt owned in his name say within five years before the date of RO was pronounced. This would enable the DGI to make more realistic assessment of the bankrupt's financial situation. The need for this to be done in this case is more pressing. In our view if the bankrupt can run himself into a debt of more than RM100 million by speculating or playing the stock market surely he would need some solid security to secure the credit line that the creditors had extended to him. In this respect we agree with learned counsel when he submitted that the DGI report 'should have gone further by highlighting all properties which had been previously owned by the bankrupt and the current owners of the property now (if any). The report should also highlight whether the current owners are in a close relationship with the bankrupt and whether there are evidences showing that the current owners are holding the properties as nominees for the bankrupt?' The DGI had failed to address all these issues in the report.

[17] Learned counsel for AmBank also submitted that the DGI report had failed to explain why the dividend offered to the creditors keep falling from time to time. He pointed to us that the first offer by the bankrupt in 2003 was in the total of RM11,346,590.08. But the second offer in 2014 was only RM10 million and the current offer is only a total of RM839,633.73. The disparity, he submitted, was never explained in the report.

[18] Learned counsel also complained that the DGI report merely states that the bankrupt was working and earning RM7,000 a month as project co-ordinator with a company called Vertica Resources Sdn Bhd. However the report did not say whether the bankrupt had other sources of income or gave any particulars about the company Vertical Resources Sdn Bhd like who owns it and who are the shareholders. Is it a family company?

[19] Another creditor, Dato' Tan Seng Leong, also did not consent to the discharge and has opposed this appeal. Dato' Tan has submitted a provable debt of RM3,500,000. Inspite of several public examinations conducted by DGI the bankrupt failed to propose a reasonable offer to settle the amount owing. The bankrupt did offer during the public examination a sum of RM10 million in total to settle the debt of all the creditors. Learned counsel for Dato' Tan argued that the offer indicated that the bankrupt has the means to settle the debt and that the bankrupt was not suffering from any serious hardship on the bankruptcy as he had the capacity to raise RM10 million. It was submitted that the bankrupt lifestyle was not affected by the bankruptcy. In his written submission learned counsel submitted:

> The appellant's (the Bankrupt) lifestyle have not been affected by the AORO adjudicated against him because according to the public examination conducted in this proceeding the Appellant (the Bankrupt) has notified the Judgment Creditors that he travels to overseas frequently

because of his work and each time he travels overseas, he will deposit a collateral amount with the Insolvency Department. The above clearly acknowledges that the Appellant (the Bankrupt) is living an ordinary life and the said AORO does not prejudice his lifestyle and the Appellant had the means to make deposits when travelling overseas which acknowledges he has the financial capacity to propose a settlement for his debt.

[20] Learned counsel submitted that all these were not adequately addressed in the DGI report. Other criticisms of the DGI report by Dato' Tan are listed as follows:

(a) The said Report failed to certify why the Bankrupt's friend was willing to propose an offer to settle the Bankrupt's debt for and on behalf of the Bankrupt.

(b) The said Report also failed to certify the value of asset of the Bankrupt's wife and three children and how did his family obtained such a luxury life.

(c) The total monthly expenses of the Bankrupt was not stated.

(d) It also does not state whether the Bankrupt had any other source of income besides his present income.

(e) The Bankrupt's assets either in his name and/or in his nominee name failed to be reported in the said Report.

(f) The said Report does not state the true/actual financial standing of the Bankrupt.

(g) The Insolvency Officer (OA) has failed to submit a complete report under Section 31(1) of the Bankruptcy Act 1967.

(h) OA has failed to state in the said Report whether the Bankrupt has any other assets not disclosed by him, assets that have been hidden or whether it is under the name of the Bankrupt's wife, children or nominee.

[21] We have scrutinised the six pages - DGI report at p. 23 RR Jld 2 B & C. We are equally appalled that in managing a debt of about RM150 million the report was very brief. We observe that it was stated in the report that the court (ie, the Bankruptcy Court) had postponed *sine die* on of the public examination sessions to allow the DGI to further investigate on the assets of the bankrupt. DGI said he completed his investigation on 1 August 2012. However there is hardly any comments or remarks in the report as to the result of the investigation or as the efforts taken to conduct the investigation directed by the court. In the circumstance we are of the view that the criticisms levelled at the DGI report as being simplistic in approach and is incomplete and defective is justified.

[22] Finally, we need to consider whether the learned High Court Judge was correct to insist that the bankrupt came up with 50% dividend before he could get a discharge. Presently the DGI report states that the available assets only totalling RM839,633.73 which is sufficient to pay dividend of only 0.552%.

[23] The learned judge had ordered that the bankrupt came up with 55% dividend because the bankrupt had 'committed an offence' under the Act for failing to file his statement of affairs within 21 days after the RO was ordered as required under s. 16(3).

[24] We notice that the requirement under that section is mandatory. Therefore a non-compliance would mean a breach of statutory provision. Therefore we say the learned judge was correct to equate it with an offence. It must be noted that a contempt of court is also a punishable offence.

[25] For the above reasons we dismissed this appeal with costs of RM5,000 to each of the supporting creditors and to be paid by the appellant Lim Chee Wah personally, and we affirmed the High Court's decision.